rates -- PEG access.[45] Indeed, in the Notice, the Commission specifically states that it does "not believe that Congress intended that cable operators subsidize programmers who seek access to their system through the provisions of Section 612."[46]

B. The Lack Of Demand For CLA Capacity Reflects The Fact That The Diversity Goal Underlying CLA Has Been Met And That The Economics of CLA Are Not Conducive To Its Use

The implicit premise in the Notice that the lack of demand for CLA capacity demonstrates that CLA rates are too high is unfounded. In fact, the lack of demand reflects the fact that the diversity goals which underlie CLA have been met and unaffiliated commercial program services already obtain carriage on cable systems without the need for CLA. As demonstrated above, in such circumstances, it would be inconsistent with the

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45 "The term commercial use is employed to distinguish from public access uses which are generally afforded free to the access user, whereas third party leased access envisioned by this section will result from a commercial arrangement between the cable operator and the programmer with respect to the rates, terms and conditions of the access use." Id. at 48; see also Notice at ¶ 27.

46 Notice at ¶ 27. Furthermore, lowering rates to a level which does not adequately compensate cable operators for the capacity captured for CLA will result in a taking without just compensation in violation of the Fifth Amendment. A permanent physical occupation of private property, when authorized by the Government, is a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). Here, the government has authorized the occupation of a cable operator's physical channel capacity by programmers unaffiliated with that operator. If the Commission now allows that occupation to occur without full compensation to the operator for the value of the channels, its action would constitute a taking in violation of the operator's Fifth Amendment rights.

statutory CLA scheme for the Commission to "force" carriage of CLA programming by creating artificially low CLA rates.

1. The Cable Industry Offers A Vast Array Of Diverse Programming From A Variety Of Sources.

Lack of diverse sources of programming on cable systems simply is no longer an issue. The cable industry today delivers over 125 national basic and pay programming services.[47] The breadth of programming content represented by these services is immense. For example, these services provide programming devoted to the arts, news, children, minorities, sports, music, comedy, government and politics, science, education, religion, movies, foreign language (including Spanish, Japanese, French, Arab, Asian, and Philippine languages), history, gardening, food, travel, automobiles, shopping, and weather. In addition, there are over 45 regional programming services offering a comparable range of diversity.[48] As described in the attached Economic Analysis, "the program supply industry remains robustly competitive, with easy entry and exit."[49]

Moreover, a large number of these program sources are unaffiliated with cable operators and thereby satisfy Congress's goal of source diversity as well as content diversity. There are over 60 existing national programming services unaffiliated with cable operators, including CNBC, The Disney Channel, ESPN and

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47 See Cablevision, Blue Book Vol. III, 46, 48.

48 Id.

49 Economic Analysis at 7.

ESPN2, Country Music Television, A&E, America's Talking, C-SPAN, The Consumer Resource Network, Lifetime, Kaleidoscope: America's Disability Network, and Telemundo.[50]

The expansion of diversity shows no signs of abating. Approximately 80 additional programming networks are preparing to launch.[51] Sixty-two of these are unaffiliated with any cable operator.[52] The ability of these services to launch and sustain operation would be adversely affected by the Commission's proposed changes to CLA.

Further, program services that are affiliated with cable operators are often not affiliated with the operator that is carrying them. This situation also promotes diversity. In fact, the Commission's channel occupancy rules require that at least 60 percent of a cable operator's programming carried on its first 75 channels be unaffiliated.[53]

The reason for the high level of diversity is simple -- it is in the cable operator's economic interest to provide a broad range of program choices. The goal of cable operators, like any business, is to maximize profits. One way in which cable operators can do that is by increasing penetration. Cable

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50 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, 11 F.C.C.R. 2060, at ¶¶ 10, 150, Appendix H, Table 2 (1995)("1995 Competition Report").

51 Id. at ¶¶ 19, 151, Appendix H, Tables 3-4.

52 Id. at ¶ 151, Appendix H, Table 4.

53 See 47 C.F.R. § 76.504(a-b).

operators increase penetration by appealing to a wide variety of subscribers, each with their own unique, sometimes narrow tastes. This goal is independent of the ratings of particular programs. Thus, if adding a targeted or niche program will attract subscribers, cable operators have consistently shown that they will do so.

This level of diversity (and the ability of the array of programming sources to obtain carriage) indicates that Congress's express purpose for adopting CLA has been accomplished. Indeed, in 1992, Congress recognized that the lack of CLA use could well be due to the fact that the industry already had accommodated a diverse array of programming sources.[54] The Commission cannot credibly take the position that it should now reinvent its rules to promote even further diversity. To the contrary, CLA is working exactly as it is supposed to work. If a need for cable carriage to promote additional diversity develops, CLA is available as the "safety valve" Congress intended.

2. There Is No Significant Unmet Demand For Access By CLA Programmers.

The minimal demand for CLA which does exist is anecdotal and episodic. There is no evidence of general unmet demand on an industry-wide basis that would justify a change in the CLA rate formula. As noted, CLA complaints have been filed against less than one percent of all cable systems in the three years since

54 1992 Senate Report at 30.

the current rules were adopted. The lack of demand is not surprising given the economics of CLA. From the inception of the cable industry, cable operators generally have paid programmers for the right to carry their services. These payments allow programmers to invest in the production of quality programming. CLA turns this model on its head, setting up a scheme where CLA programmers generally pay for the right to be carried. Obviously, this presents a different, more difficult economic model for programmers.[55] Moreover, because CLA is inherently a system-by-system model, it eliminates the economies of scale that are integral to the success of national program services.[56] Consequently, as one CLA programmer has stated, it would be "Pollyannaish to say that if you reduce the costs of leased access, the new programming will flood in."[57] Certainly, to burden the entire cable industry with excessive extra costs and regulatory restraints on the basis of conjecture, and because of a few isolated complaints from CLA programmers, would be unnecessary and overinclusive.

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[55] The 1992 Senate Report acknowledges that "[t]he cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use." Notice at ¶ 26; 1992 Senate Report at 31-32.

[56] Bridal Channel Chairman Robert Chitestar said that the "cost of leasing channels on 14,000 different cable systems is 'phenomenal.'" Parent TV President James Zeliner concurred, saying that "leased access 'is not very practical for national distribution.'" <u>Communications Daily</u> at 3 (Thursday, April 11, 1996).

[57] Bridal Channel Chairman Robert Chitestar, <u>Id.</u> at 3.

This is particularly true because quality program services, both those that are affiliated with cable operators and those that are not, have proliferated. They have sought and obtained national cable distribution through methods other than CLA. Such programmers are able to reach distribution agreements in the marketplace because they are able to: (1) find a financially viable niche audience; (2) invest in high-quality program production; and (3) achieve national appeal. This fact, more than any other, explains why there is low demand for CLA.[58]

IV. THE PROPOSED CHANGES TO THE CLA RULES WOULD CAUSE SERIOUS HARM TO CONSUMERS AND PROGRAMMERS.

The Commission should make no changes in the CLA rules given the likelihood that such changes would significantly harm consumers and programmers, as well as cable operators. Of course, the various harms that would occur if the proposed changes to CLA are adopted overlap. That is, to the extent cable operators' financial, operational and marketing condition are harmed, as described above, consumers and programmers suffer a welfare loss. Similarly, to the extent consumers and programmers are harmed, as described below, cable operators are worse off.

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[58] Moreover, as the Commission has recognized, cable operators face increasing competition from DBS, MMDS, telcos, low power television, and other alternative MVPDs. See, e.g., 1995 Competition Report at ¶ 9, ¶¶ 49-50. This increased competition has two relevant effects. First, it increases the incentive that cable operators have to carry the programming subscribers demand or else the subscriber will go elsewhere. Second, these MVPDs give programmers alternative means of reaching subscribers. Both of these effects also explain why demand for CLA is very low.

Thus, the harms to consumers and programmers described in this section are further evidence that the Commission's proposed rule changes violate the Act's mandate that the Commission's CLA rules not harm cable operators.

As a general matter, the problem with CLA is that it produces programming that consumers do not value and often find offensive. This is not the fault of the Commission's rules. It is inherent in the CLA scheme which, as noted, generally results in CLA programmers paying for carriage, the opposite of the economic model under which other successful programmers operate. However, if the Commission amends its rules in an attempt to create CLA demand, it will inevitably intensify this problem. In short, the Commission will create a situation in which operators are forced to drop substantial amounts of programming that consumers do value in order to add CLA programming that they do not.

Time Warner Cable believes that its experience with CLA programming is generally typical of the industry. In preparation of its comments in this Notice, Time Warner Cable conducted an internal survey and found that, over the last five years, approximately 68 percent of CLA programming on its systems has consisted of infomercials. This programming, like all CLA programming, attracts minuscule viewership. Consequently, most subscribers whom Time Warner Cable recently surveyed said they would pay nothing (56 percent) or only a very small amount for all the CLA programming on their system.

Perhaps most importantly, CLA has attracted programming which consumers find highly objectionable. One example is found in Time Warner Cable's Rochester, N.Y. system. That system is required to carry a CLA program entitled "Life Without Shame." This program features nude dancing "accompanied by often crude commentary by two program hosts."[59] In one show, the host "laughs on camera as a homeless man -- whom he has bribed with the promise of free alcohol -- dances with an inflatable female doll."[60] "Life Without Shame" has triggered an avalanche of protest from subscribers, public figures, and local community leaders. Religious groups organized a boycott of the system.[61] Subscribers dropped their cable service.[62] In addition to the adverse publicity that inevitably accompanies distribution of

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59 Rick Moriarty, "Lawmakers Team Up To Take "Shame" Out Of Cable Television," Post Standard, Rochester, NY, at B1 (January 10, 1996).

60 Donna Jackel, "GRC Can't Censor Explicit Show Here," Democrat and Chronicle, Rochester, NY, at 15A (October 6, 1994).

61 Jim Orr and Janet Cho, "Pastors Ask GRC To Pull Plug On Free Show," Democrat and Chronicle, Rochester, NY, at 4B (October 31, 1994).

62 A typical response among outraged subscribers was: "Our purpose in canceling cable was to send a message to those in charge of programming that we would refuse to allow into our home, let alone pay for, shows such as "Life Without Shame." David and Barbara Paine, "Dropping Cable Was A Blessing In Disguise," Democrat and Chronicle, Rochester, NY, at 15A (December 13, 1994).

such programming, Time Warner Cable experienced significant costs in attempting to deal with subscriber anger.[63]

This is the legacy of commercial leased access. Does the Commission really want to adopt a rule which requires Time Warner Cable to drop C-SPAN II or The Family Channel in order to carry the glut of infomercials and sexually explicit programming that CLA produces?

A. Changing The Current CLA Rules Will Harm Consumers.

Consumers place very little or no value, and often negative value on CLA programming. For example, a June, 1994 survey of Time Warner Cable's system in Rochester, N.Y., revealed that 55 percent of subscribers found the leased access programming offered on the system "not at all valuable." In another survey over half of Time Warner Cable subscribers indicated that they would pay nothing for leased access programming.

In addition, as described above, CLA programmers generally provide, at best, marginal programming and, at worst, programming which consumers find offensive. The vast majority of CLA programmers are part-time with very high churn rates (i.e., CLA programmers generally do not stay in business very long and, therefore, do not provide a reliable program source upon which consumers can establish viewing patterns and program loyalty).

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63 For example, Time Warner Cable installed traps free of charge to objecting subscribers, provided lockboxes to requesting subscribers and devoted substantial man-hours dealing with angry subscribers.

Thus, lowering the CLA rate to create CLA demand will result in the displacement of programming consumers value with programming they do not value. And, depending on the amount of demand the rule change triggers, there could be a significant loss of valued programming -- 10 to 15 percent of the total channels that consumers receive.[64] This problem is all the more troublesome because consumers will experience a reduction in the quality of their cable service with no corresponding reduction in the amount they pay for cable service.

As described in the Economic Analysis, "[i]f the effect of the new pricing formula is to replace highly valued programming with programming that consumers value less highly, then it follows that consumer welfare will be reduced and cable companies will be harmed."[65]

B. Changing The Current CLA Rules Will Harm Programmers.

If the Commission modifies the CLA rules in order to generate more demand among CLA programmers, it will, in effect, reduce the amount of channel capacity that is available for non-CLA programmers. This could have a severe impact on cable programmers since their ability to obtain cable distribution is often a function of channel capacity. Producing quality cable

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64 It is worth noting that this loss of valuable channels is added to the loss that already occurs because of public, educational, and governmental channels and must carry.

65 Economic Analysis at 8.

programming services is an expensive and risky proposition.[66] The Commission should avoid taking any action which makes the task more difficult.

This concern is not theoretical. Although system channel capacity has increased over the years, cable operators have used it to add a significant amount of new high quality programming. As a result, channel capacity for new programmers remains an important issue. For example, well over 90 percent of Time Warner Cable's systems have no unused channel capacity. Thus, if an artificially low CLA rate encourages additional CLA programmers to request capacity, it will come at the expense of programmers who are now carried on Time Warner Cable's systems. Similarly, even as additional capacity develops, carriage requests by low quality CLA programmers will absorb a share of newly available channels and thereby deny carriage to non-CLA programmers that are valued by consumers.

This will impact small, start-up programmers hardest. These services, such as C-SPAN 2, Home & Garden Television Network, and The Sci-Fi Channel, must obtain carriage if they are to survive in the marketplace. Further, start-up channels, because they have not had sufficient time to develop viewership among consumers, also are the most likely to be dropped if changes in the current CLA rules spark artificial demand for CLA capacity.

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66 See "The Birth of New Networks: A Comprehensive Guide to Tomorrow's Cable Programming," Cablevision: New Network Handbook (Special Supplement) (1996) at 16A.

As recently stated in a Cablevision magazine article discussing the viability of new programming networks, "distribution is still the name of the game."[67] For this reason, the Commission should not manipulate the CLA rules in a way which forecloses distribution opportunities.[68]

The impact of a low CLA rate would not be limited to national program services. Time Warner Cable created "New York 1 News," a local news channel in its New York City cable system, and plans to launch similar services in other systems. Other cable operators have developed similar local news services. These channels would be threatened, as well, by any departure from the current CLA rules which reduces the already limited unused channel capacity.

The potential for great harm if the Commission makes a mistake in modifying the CLA rules essentially increases the already high risks associated with the programming business. Moreover, the mistakes are likely to be non-linear, i.e., a relatively small mistake can have disproportionately large negative consequences in terms of channel capacity lost. The increased risks, in turn, will reduce the amount of capital firms are likely to devote to developing new programming, particularly

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67 Id. at 3A.

68 As explained above, the economics of CLA, particularly the fact that CLA programmers must pay for carriage and cannot capture the scale economies of national distribution, mean that CLA would not be a viable alternative for these start-up programmers.

innovative types of programming. In short, the proposed modifications to the CLA rules could actually reduce diversity. Such a result would be incongruous, given that Congress's purpose in creating CLA was to increase diversity.

V. CONCLUSION.

For the reasons set forth above, the Commission should retain its present CLA maximum rate formula.

Respectfully submitted,

TIME WARNER CABLE

By ______________________

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15 May 1996

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 15th day of May, 1995, copies of the foregoing Comments of Time Warner Cable were delivered by hand, unless otherwise indicated, to the following parties:

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AN ECONOMIC ANALYSIS OF COMMERCIAL LEASED ACCESS PRICING

Prepared for
Time Warner Cable

by

A. Daniel Kelley
Hatfield Associates, Inc.

May 15, 1996

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AN ECONOMIC ANALYSIS OF COMMERCIAL LEASED ACCESS PRICING[1]

I. INTRODUCTION AND SUMMARY

In its 1992 Rate Order, the Commission adopted the highest implicit fee formula for commercial leased access pricing.[2] The Commission now finds ". . . that relatively little leased access capacity is being used by unaffiliated programmers."[3] Consequently, the Commission proposes to change the highest implicit fee formula to a "cost/market rate" formula.[4] Time Warner Cable, a division of Time Warner Entertainment Company, L.P., has requested Hatfield Associates, Inc. ("HAI") to analyze the potential consumer welfare effects of the proposed change.

The Commission's proposal to change the highest implicit fee formula for commercial leased access and replace it with a cost/market formula would reduce consumer welfare. The apparent lack of demand for commercial leased access capacity simply reflects video programming market economics. Therefore, changing the existing commercial leased access pricing formula will not lead to more and better cable programming. The opposite is true. Programs popular with small but significant audiences will be

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[1] A description of Hatfield Associates is attached along with the resume of A. Daniel Kelley.

[2] The implicit fee is the difference between subscriber revenues and programmer license fees. Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993). ("Rate Order").

[3] Rate Order, para. 6.

[4] See, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, released March 26, 1996. ("NPRM")

replaced with less valued, or even affirmatively disliked programming. The result would be harm to both cable operators and their customers.

The existing level of commercial leased access programming is relatively small. An economic analysis of programming shows that commercial leased access is simply not a viable means of delivering many types of programming. The public policy objectives that Congress established for commercial leased access are being met in the video marketplace in other, more efficient, ways. Consumers have available an increasing array of diverse cable and non-cable programming alternatives, both in terms of content variety and programming sources.

In adopting the maximum rate formula in 1993, the Commission recognized that inefficiently low commercial leased access prices can disrupt cable company operations. The passage of time has not diminished this potential problem. Accelerating video competition means that the problems that inefficiently low leased access prices can cause are even greater today than they were only a few years ago. Disruptions to cable programming due to low commercial leased access prices will place cable operators at a competitive disadvantage to Satellite Master Antenna Television ("SMATV"), Direct Broadcast Satellite ("DBS"), Multipoint Mulitichannel Distribution Systems ("MMDS"), or telephone company video system operators. These competitors are not burdened with commercial leased access requirements.

This paper provides an economic evaluation of the Commission's proposed rule changes in light of the evolving market in which cable operators compete. Section II discusses the public policy objectives that commercial leased access are supposed to satisfy. Section III is an empirical discussion of the current demand for commercial leased access capacity. Factors affecting the supply of leased access programming are discussed in Section IV; while the costs to cable companies of providing leased access capacity are discussed in Section V. The public interest impact of the Commission's proposed rule changes is evaluated in light of these supply and demand factors in Section VI. The conclusion drawn in Section VII is that no changes in the current commercial leased access rules are warranted.

II. COMMERCIAL LEASED ACCESS AND PUBLIC POLICY

The Congress evidently had several concerns in mind when it imposed commercial leased access requirements in 1984 and extended them in the 1992 Act.[5] At least three potential concerns can be identified. First, there was evidently a fear that cable providers would not provide a diverse array of program choices for viewers. Second, there was concern that cable operators would restrict non-affiliated voices through their editorial control over content. Third, there was evidently some concern that cable operators would use their position in the

[5] Congressional objectives are described on pp. 3-4 of the, NPRM, supra, note 4.

programming distribution to restrict competition in the production of programs. The objective of commercial leased access then is to provide independent programmers with channel capacity that is not under the editorial control of the cable operator.

Congress, however, placed a considerable constraint on this objective. The potential for disruption in cable operations that commercial leased access could cause was explicitly recognized. Congress required that these disruptions be minimized. As the Commission notes, its commercial leased access should not ". . . adversely affect the operation, financial condition, or market development of the cable system."[6]

Moreover, Congress did not place a common carrier requirement on cable company commercial leased access offerings. In fact, Congress specifically limited the maximum number of channels to be made available on a leased basis. Taken in conjunction, these limitations demonstrate that Congress did not intend that commercial leased access serve as the primary means of delivering programming diversity or promoting programming competition.

Congress obviously intended that its commercial leased access policy serve as a backstop to allow independent programmer access to cable subscribers in the event that a cable operator fails to satisfy the public policy objectives. If this were not so, Congress would have done things differently. First, Congress

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[6] Id., para. 26.

would have attempted to impose a strict common carrier requirement on some or all cable capacity. Second, Congress would have reserved capacity for the exclusive use of commercial leased access. Instead, Congress allowed cable operators to program all of their channels unless commercial leased access materialized at prices that do not disrupt cable company operations.

In any event, as discussed further below, the Congressional objectives are being met in other ways. Increased capacity on cable systems allows an incredibly diverse array of programming, much of it niche services catering to varying individual tastes. In 1994, 96.9 percent of all cable subscribers had access to cable systems with a capacity of 30 or more channels.[7] The industry trend is clearly to systems with 54 or more channels of capacity.[8] The number of cable networks available to cable customers is also increasing as the capacity to distribute them grows. The number of networks grew by 26.7 percent between 1993

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[7] See, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, released December 11, 1995, p. B-2. ("Competition Report")

[8] In 1994, systems with 54 or more channel capacity increased by 10.1 percent while the number of systems with capacity of less than 54 channels declined. See, Competition Report, supra, note 7, p. B-2.

and 1994.[9] Approximately half of the networks are not affiliated with any cable operators.[10]

The Commission's program access rules provide an independent means of limiting cable operator control over programming.[11] These rules are controversial and may even be found unlawful.[12] However, as long as they are in effect, they are related to one of the Congressional objectives behind the commercial leased access requirement.

Public, Educational and Governmental ("PEG") access channels in many systems provide an additional source of capacity for unaffiliated speakers. As of October 1995, there were 4,923 cable systems with PEG originations. Community bulletin boards, religious access and public service announcements were originated on 3,534 systems. The total number of cable systems was 11,112.[13]

There are many sources of local news and opinion. Local broadcast stations, whether received over the air or on cable systems, provide competing sources of news and opinion. In

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[9] Id., p. B-3.

[10] Id., p. 73. The percentage of networks with cable ownership interests actually declined between 1993 and 1994.

[11] These rules limit cable operator control over programming. See C.F.R. §§ 76.1000-76.1003.

[12] See, Competition Report, supra, note 7, paras. 148-172.

[13] See, Warren Publishing, Inc., Television and Cable Factbook, Cable Volume No. 64, 1996 ed. at F-2.

addition, 1,635 cable systems originated live programming and local sports in 1995.[14]

Finally, the program supply industry remains robustly competitive, with easy entry and exit. The large and growing number of competing cable networks was cited above. Owen and Wildman report that ". . . many firms that supply the networks and syndicate programs to independent stations also supply programs to cable program services, and there are no important entry barriers for those that currently do not."[15]

Even if the demand for commercial leased access capacity is not high, the objectives behind the requirement that this capacity be made available are being met with a minimum of disruption to cable system operators. There is growing capacity and diversity. PEG and other locally originated programming is prevalent. Program supply is competitive and not dominated by any single provider. Therefore, any benefits associated with changes to the commercial leased access rules are correspondingly limited.

III. COMMERCIAL LEASED ACCESS DEMAND

Time Warner provided HAI confidential and proprietary internal information concerning the current usage of commercial leased access capacity, as well as information concerning inquiries from potential leased access programmers. These data

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[14] Id.

[15] See, Owen, Bruce M. and Steven S. Wildman, Video Economics, (1992), pp. 60-61.

confirm that, in most systems, limited leased access demand is an equilibrium state and that lower prices will not stimulate demand.

The composition of demand is relevant also. The data show that many of the limited number of inquiries come primarily from home shopping and infomercial operators. Most cable systems already carry this type of programming. If the only effect of reduced commercial leased access prices is to substitute existing shopping networks and commercially oriented programming with the same type of programming, consumer welfare will not increase, but cable operator revenues will fall. If the effect of the new pricing formula is to replace highly valued programming with programming that consumers value less highly, then it follows that consumer welfare will be reduced and cable companies will be harmed.

Cable operators could also be financially harmed if the only effect of the new formula is to transfer existing entertainment or news and public affairs programs to the commercial leased category.[16] In this case, revenues will be lost to the cable operators as programmers paying rates at or close to the maximum implicit fee shift their programming to leased access. Cable operators could be harmed even if the only effect of the new formula is to supplement existing programming through the addition of commercial leased access programming to previously

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[16] This result is logically possible, but unlikely. The more likely result is that low quality programming will push out high quality programming.

dark channels. This result can come about if commercial leased access programmers offer programming that cable subscribers find offensive or distasteful. In this case, some portion of the subscriber base will cancel cable service. This is not a theoretical situation, the Time Warner System in Rochester, NY reports that it has lost subscribers due to the content of commercial leased access.

Finally, it is relevant that the Congressional objectives that commercial leased access is supposed to fulfill can be fulfilled, and are being fulfilled, from other programming sources. As noted above, many of those who have expressed an interest in capacity are commercial operations interested in retailing to cable company subscribers. Home shopping and infomercials are already widely available. In effect, existing satellite networks efficiently resell time for infomercials, providing a form of commercial access. The carriage of home shopping networks has increased, perhaps to an inefficiently high level, due to local must carry requirements.

Beyond these types of product marketing services, the expansion of cable industry capacity in recent years has allowed a proliferation of cable networks catering to ever more diverse tastes. Highly specialized cable networks are now available. Ratings data show that many of these networks have quite small audiences -- i.e., they appeal to niche tastes.[17]

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[17] Despite low ratings, the programs may be valuable in cable system lineups because they attract subscribers on the margin.